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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957.

No. 67

NASHVILLE MILK COMPANY,

Petitioner,

vs.

CARNATION COMPANY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

RESPONDENT'S BRIEF.

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RESPONDENT'S BRIEF.

STATUTES INVOLVED.

In addition to Section 3 of the Robinson-Patman Act, quoted in petitioner's brief (p. 2), and the entire Act (Pet. Br. 25)[1] the following statutes are involved. The pertinent parts thereof are as follows:

Clayton Act, Section 1, 38 Stat. 730 (1st paragraph):

> "Antitrust laws" as used herein includes the Act entitled "An Act to protect trade and commerce against unlawful restraints and monopolies", approved July second, eighteen hundred ninety; sections seventy-three to seventy-seven, inclusive, of an Act entitled "An Act to reduce taxation, to provide revenue for the Government, and for other purposes", of August twenty-seventh, eighteen hundred and

1. The text of the Robinson-Patman Act as printed in Petitioner's Brief is in error in that none of the text following the words "is amended to read as follows:" in Section 1 is indented.

ninety-four; an Act entitled "An Act to amend sections seventy-three and seventy-six of the Act of August twenty-seventh, eighteen hundred and ninety-four entitled 'An Act to reduce taxation, to provide revenue for the Government, and for other purposes,'" approved February twelfth, nineteen hundred and thirteen; and also this Act.

Clayton Act, Section 4, 38 Stat. 731, Title 15 U. S. C. § 15:

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold, the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

Clayton Act, Section 16, 38 Stat. 737, 15 U. S. C. §26:

That any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws *. * *

R. S. §7, 1 U. S. C. (1934 ed.) §21 (now 1 U. S. C. §301):

The enacting clause of all Acts of Congress shall be in the following form: "Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled."

R. S. §9, 1 U. S. C. (1934 ed.) §23 (now 1 U. S. C. §103):

No enacting or resolving words shall be used in any section of an Act or resolution of Congress except in the first.

R. S. §10, 1 U. S. C. (1934 ed.) §24 (now 1 U. S. C. §104):

Each section shall be numbered, and shall contain as nearly as may be, a single proposition of enactment.

Section 1, 61 Stat. 633, 1 U. S. C. §204(a):

In all courts, tribunals, and public offices of the United States, at home or abroad, of the District of

Columbia, and of each State, Territory, or insular possession of the United States—

(a) United States Code.—The matter set forth in the edition of the Code of Laws of the United States current at any time shall, together with the then current supplement, if any, establish prima facie the laws of the United States, general and permanent in their nature, in force on the day preceding the commencement of the session following the last session the legislation of which is included: *Provided, however*, That whenever titles of such Code shall have been enacted into positive law the text thereof shall be legal evidence of the laws therein contained, in all the courts of the United States, the several States, and the Territories and insular possessions of the United States.

STATEMENT OF THE CASE.

Petitioner's summary of the proceedings in the courts below (Br. 3) does not make clear what occurred there. In essence, Respondent sought dismissal in the District Court upon three grounds (R. 10-11); (1) that no private remedy lies for a violation of Section 3 of the Robinson-Patman Act (the question before this Court); (2) that petitioner could not sue for a violation of the Robinson-Patman Act in view of the Congressional policy relative to filled milk stated in the Filled Milk Act, 42 Stat. 1486, 21 U. S. C. §§61-63; and (3) that Petitioner did not allege that Respondent sold or contracted to sell filled milk in interstate commerce, and therefore did not allege a violation of Section 3 of the Robinson-Patman Act. The District Court sustained Respondent's motion to dismiss on the second of the three grounds, expressly overruling the other two grounds (R. 11). On appeal, Respondent urged the correctness of the District Court's decision upon each of the three grounds. The Court of Appeals, convinced of the merits of the first ground, expressly declined to consider the other two (R. 14).

Also, Petitioner incorrectly states (Br. 4) that the complaint alleges Respondent and its subsidiaries "own and operate 30 factories in more than 20 states for the processing of filled milk." The allegation in question relates to factories for the processing of "milk", not "filled milk" (R. 4).

SUMMARY OF ARGUMENT.

Petitioner's right to the private remedies afforded by the Clayton Act, for a claimed violation of Section 3 of the Robinson-Patman Act, depends upon whether Congress impliedly made Section 3 an "antitrust law" as defined by the Clayton Act. The presumption is against amendments by implication. In the final analysis the intent of Congress must control.

I.

The continued intent and policy of Congress has been to limit the antitrust laws for violation of which private suits may be brought to those antitrust laws designated in Section 1 of the Clayton Act. For reasons indicated by the Court of Appeals (R. 15, 16), reference must be made to the original text of Section 1 of the Clayton Act which defines "antitrust laws" to be the Sherman Act, certain sections of the Wilson Tariff Act, and the Clayton Act. Congressional refusal to include the Federal Trade Commission Act within this definition, or to provide treble damages for its violation, and Congressional failure to enlarge the definition of "antitrust laws" in Section 1 despite the passage of additional antitrust laws, demonstrates the continued intent and policy of Congress that this definition exclude all other antitrust laws.

II.

A. The text of the Robinson-Patman Act, including its title, its enacting clause, its division into four sections, and particularly its use of quotation marks, shows Congress intended that Section 3 was not to become part of the Clayton Act. The *Vance* case held the entire Robinson-Patman Act to be an amendment of Section 2 of the Clayton Act. This decision is erroneous because it attached no significance to the title of the Act or to the use of quotation marks and because it construed the enacting clause contrary to the provisions of R.S. §§7 and 9. There is no merit to Petitioner's argument that Section 3 amends the Clayton Act generally because it deals with the same subject matter. When Congress wishes to add a new section to an existing act, it does so expressly. Moreover, the third clause of Section 3, invoked here, deals with a different subject matter than the Clayton Act. Nor is there merit to Petitioner's argument that one statute amends another where the latter adds to or subtracts from or changes the scope or effect of the earlier, for Section 3 in no way adds to or subtracts from the Clayton Act or changes its scope or effect. The repeal of Section 3 would not affect the Clayton Act in any manner whatsoever.

B. The legislative history of Section 3 also shows Congress did not intend Section 3 to be an amendment of the Clayton Act. Section 3 originated in the Senate as subsection (h) of a proposed amendment of Section 2 of the Clayton Act and went to a conference committee of both houses as such an amendment. The Conference Committee compromised the bills passed by the House and Senate by deleting the Section 3 language as an amendment of Section 2 of the Clayton Act and adding it as a separate Section 3 of the bill, thus affirmatively demonstrating an intent that Section 3 was not to become part of the Clayton

Act. The report of the House members of the Conference Committee and the debates on the Conference bill also show that Congress did not intend Section 3 to become part of the Clayton Act. The debates relied upon by Petitioner as showing the contrary indicate merely that when an act is committed in violation of the overlapping provisions of Section 3 and the amendment of Section 2 of the Clayton Act provided for by Section 1 of the bill, the violator can not only be proceeded against criminally under Section 3, but is also subject to treble damages by reason of his violation of the amended Section 2 of the Clayton Act.

C. There is no merit to Petitioner's contention that the action and nonaction of the House Judiciary Committee in codifying Section 3 is an administrative interpretation; and Petitioner's contention is directly contrary to 61 Stat. 633, 1 U. S. C. §204(a) and *Stephan* v. *United States*, 319 U. S. 423, holding provisions of the Code cannot stand when they are inconsistent with the Statutes at Large.

III.

The decision of the Court below states the sounder view of the decided authorities. The leading authority supporting Petitioner's position, other than *Vance*, is *Balian Ice Cream Co.* v. *Arden Farms Co.*, 94 F. Supp. 796. Its conclusions are unsatisfactory, however, because they are based on the erroneous premises that the Sherman Act, the Wilson Tariff Act, and the Clayton Act were *all* of the antitrust laws in existence when the Robinson-Patman Act was enacted and that there has been a Congressional policy to use treble damage actions to enforce all antitrust laws. Further, the Court apparently was not fully informed concerning the legislative history of the Act and none of the authorities cited by it involved the specific issue presented

here. The decisions of this Court in *Bruce's Juices* v. *American Can. Co.*, 330 U. S. 743 and *Moore* v. *Mead's Fine Bread*, 348 U. S. 115, contain dicta upon which Petitioner relies. However, these decisions are soundly based upon Section 2 of the Clayton Act and the dicta have, therefore, no weight. Petitioner's argument that the dicta should be treated as if they were the considered opinion of this Court in the face of which Congress had taken no action is without merit.

ARGUMENT.

Petitioner's right to the remedies provided by Section 4 and 16 of the Clayton Act (38 Stat. 731, 737, 15 U. S. C. §§ 15, 26), for an alleged violation of Section 3 of the Robinson-Patman Act (49 Stat. 1528), depends upon "whether Section 3 of the Robinson-Patman Act became one of the 'antitrust laws' as defined by Section 1 of the Clayton Act" (Pet. Br. 9).

Congress did not expressly make Section 3 of the Robinson-Patman Act one of these "antitrust laws." Petitioner argues that Congress did so by implication. But the presumptions are against Petitioner on this score; amendments by implication are not favored. Sutherland, *Statutory Construction*, 3d Ed., §§ 1913, 1930. As is there said (§ 1930):

> "* * * As to changing statutory law, there is a presumption against the implied * * * amendment of any existing statutory provision. In accord with this conservative attitude, an amendatory act is not to be construed to change the original act or section further than expressly declared or necessarily implied."

This rule applies with especial force here, where the result of the implied amendment would be the creation of additional private rights to sue for treble damages for violation of the "antitrust laws". *Wilder Mfg. Co. v. Corn Products Co.*, 236 U. S. 165, 174-175. As was said by this Court in the *Wilder* decision (pp. 174-175 of 236 U. S.):

> "* * * where a statute creates a new offense and denounces the penalty, or gives a new right and declares the remedy, the punishment or the remedy can only be that which the statute prescribes."

In the final analysis, of course, whether Section 3 of the Robinson-Patman Act became one of the "antitrust laws"

as designated in Section 1 of the Clayton Act must be determined by ascertaining the intent of Congress. *U. S. v. Amer. Trucking Ass'ns*, 310 U. S. 534, 542; *O'Prey v. United States*, 249 U. S. 323. See also *First State Bank of Shelby v. Bottineau*, 56 Mont. 363, 185 Pac. 162-164, relied upon by Petitioner (Br. 18-19).

I.

IT HAS BEEN THE INTENT AND POLICY OF CONGRESS TO LIMIT THE ANTITRUST LAWS FOR VIOLATION OF WHICH PRIVATE SUITS MAY BE BROUGHT TO THE ANTITRUST LAWS EXPRESSLY ENUMERATED IN SECTION 1 OF THE CLAYTON ACT.

With respect to Section 1 of the Clayton Act, reference must be made to the original text (38 Stat. 730, quoted *supra*) instead of its codification in 15 U. S. C. § 12 for the reasons set forth in the opinion of the Court below (R. 15-16) and at pages 14-16 of the petitioner's brief in *Safeway Stores, Inc. v. Vance* (No. 69 at the Oct. 1957 term of this Court). Section 1 of the Clayton Act (38 Stat. 730), which has never been amended, specifies that "antitrust laws" as used throughout the Clayton Act includes the Sherman Act, certain sections of the Wilson Tariff Act, as amended, and the Clayton Act itself.[2]

It is Respondent's position that it was and has been the intent and policy of Congress to limit this term "antitrust laws" for all purposes of the Clayton Act to these statutes and to subsequent enactments constituting parts of one or more of them.

The express enumeration of these statutes implies the

2. Many statutes other than these three are often referred to as "antitrust laws". There are 71 acts so designated in the compilation, "Antitrust Laws with Amendments 1890-1951", compiled by Elmer A. Lewis, Superintendent Document Room, House of Representatives, and printed by the Government Printing Office 1955.

exclusion of all other anti-trust laws—*inclusio unius est exclusio alterius*.[3] If Congress had intended to include other antitrust laws it would either have said so or would have used the term "antitrust laws" in the Clayton Act without defining it. The mere fact that the term is defined demonstrates the intention of Congress to limit the phrase to the three named antitrust laws.[4]

Other facts also demonstrate this intent of Congress. The Federal Trade Commission Act (38 Stat. 717), another antitrust law, was pending in Congress at the same time as the Clayton Act. Before the passage of either, Senator Reed called the Senate's attention to the fact that the Federal Trade Commission Act was not included as an "antitrust law" in Section 1 of the Clayton bill (51 Cong. Rec. 13117-13118). Thereafter an amendment of the Federal Trade Commission bill was offered in the Senate to permit treble-damage suits to be maintained for injuries resulting from violations of that Act (51 Cong. Rec. 13143) but the amendment failed to pass (51 Cong. Rec. 13150). Congress plainly understood and intended, therefore, that the definition of "antitrust laws" in Section 1 of the Clayton Act was exclusive and limited the application of Sections 4 and 16 of the Clayton Act to violations of the Sherman Act, certain sections of the Wilson Tariff Act and the Clayton Act.

If this were not true, private injunction and treble-damage suits could be maintained not only for violations of the Federal Trade Commission Act, but also for violations of Section 15 of the Shipping Act of 1916 making certain agreements unlawful unless approved by the Shipping Board (39 Stat. 733, 46 U. S. C. § 814), Section 202 of the

3. The naming of only five of the 77 sections of the Wilson Tariff Act as "antitrust laws" also indicates the exclusionary purpose of the statute.

4. See the discussion of this point at pp. 12-13 of the petitioner's brief in *Safeway Stores, Inc.* v. *Vance* (No. 69 at the Oct. 1957 term of this Court).

Packers and Stockyards Act prohibiting certain acts, agreements and conspiracies relating to prices and safes territories (46 Stat. 161, 7 U. S. C. § 192), Section 337 of the Tariff Act of 1930 prohibiting unfair methods of competition and unfair acts in the importation of articles into the United States (46 Stat. 703, 19 U. S. C. § 1337), Section 408 of the Civil Aeronautics Act of 1938 making unlawful certain agreements, consolidations, mergers, etc. of air carriers unless approved by the Civil Aeronautics Authority (52 Stat. 1001, 49 U. S. C. § 488), and Sections 3 and 4 of the Bank Holding Company Act of 1956 which make unlawful certain ownership of the voting shares of two or more banks and certain bank mergers (70 Stat. 134, 135, 12 U. S. C. §§ 1842, 1843).

Despite the enactment of other antitrust laws after the Clayton Act, and despite the continued existence of the Federal Trade Commission Act, Congress has not seen fit to amend Section 1 of the Clayton Act to increase the number of statutes that, when violated, subject their violators to private suits for treble damages and injunctions. A bill to amend Section 1 of the Clayton Act to include Section 3 of the Robinson-Patman Act as one of the designated "antitrust laws" was introduced in the 84th Congress, second session (S. 3516) but failed to pass.

This long continued Congressional policy of not extending the meaning of the term "antitrust laws" in Section 1 of the Clayton Act to include subsequently enacted antitrust laws demonstrates a continuing Congressional intent that the definition of "antitrust laws" in Section 1 be exclusive.[5]

5. Congress treated this definition as an exclusive one in Sec. 29 of the Marine Insurance Association Act (41 Stat. 1000, 46 U. S. C. § 885) and in Sec. 414 of the Civil Aeronautics Act (52 Stat. 1004, 49 U. S. C. § 494) in which it referred to the "'antitrust laws' as designated in Section 1 of the" Clayton Act. And in the Bulwinkle Act (62 Stat. 472, 49 U. S. C. § 5b) Congress provided that the term "antitrust laws" had "the meaning assigned to it in Section 1 of the" Clayton Act.

Unless, therefore, Section 3 of the Robinson-Patman Act was so clearly intended by Congress to be part of the Clayton Act as to overcome the presumption against it, it is not one of the "antitrust laws" for violation of which a private action may be maintained for an injunction or for treble damages.

II.

CONGRESS DID NOT INTEND SECTION 3 OF THE ROBINSON-PATMAN ACT TO BECOME PART OF THE CLAYTON ACT.

A. The Text of the Robinson-Patman Act Shows That Congress Did Not Intend Section 3 to Become Part of the Clayton Act.

Respondent's position is that, contrary to the decision of the Court of Appeals for the Tenth Circuit in *Vance v. Safeway Stores, Inc.*, 239 F. 2d 144, the title of the Robinson-Patman Act,[6] its enacting clause, its division into four sections, and particularly its use of quotation marks, all demonstrate Congress intended that Section 3 was not to become part of the Clayton Act.

As was said by Chief Judge Duffy, a former United States Senator (Wisconsin 1933-1939), for the Court below (R. 16):

> "This omission of quotation marks is significant to one who is accustomed with the procedures used in drafting bills and amendments thereto in the Congress of the United States. Illustrations of the practice of enclosing in quotation marks that portion of the bill which amended other laws can be seen in such legislation as * * *, in each of which quotation marks enclose the portions of those bills which amended existing law while the quotation marks were omitted for those portions of the bills which were not amendments."

6. The Robinson-Patman Act is printed in Appendix I to Petitioner's brief (p. 25). It is correctly reproduced except that there are no indentations of any of the original text (49 Stat. 1526).

The *Vance* decision (p. 146, 239 F. 2d) reasoned that the enacting clause of the Robinson-Patman Act included the statement that "Section 2 of the [Clayton Act] is amended to read as follows:" and (there being no enacting clauses in Sections 2, 3, or 4, held that this enacting clause applied to all four sections of the Act. The Court attributed no significance either to the fact that Sections 2, 3 or 4 are not included in quotation marks, as are subsections "(a)" through "(f)" of Section 1, or to the statement in the title of the Act that the act is one to amend Section 2 of the Clayton Act "and for other purposes". The Court consequently held that all four sections of the Robinson-Patman Act comprised the new text of an amendment of Section 2 of the Clayton Act.[7]

That Court's basic error was in construing the enacting clause to include all of the following language:

> "*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That section 2 of the [Clayton Act] * * * is amended to read as follows:" (Italics not supplied.)

The Court apparently overlooked R. S. § 7 (1 U. S. C. (1934 ed.) § 21), in effect when the Robinson-Patman bill was drafted, which prescribed the form of the enacting clause and stated that it should consist of only the italicized words in the above quotation.[8]

Further, the Court overlooked R. S. § 9 (1 U. S. C. (1934 ed.) § 23), which provided that no enacting words should

7. If this were true, the criminal penalty of Section 3 of the Robinson-Patman Act would apply to violations of Section 2 of the Clayton Act. Section 3 imposes its penalties upon "Any person violating any of the provisions of *this section*". (Italics supplied.)

8. The text of R. S. § 7 is stated, *supra*, in "Statutes Involved". It is now found in 1 U. S. C. § 101.

be used in any section of an act of Congress except the first."

If possible, a statute should not be construed in a way that implies Congress was ignorant of the meaning of the language it employed. *Montclair* v. *Ramsdell*, 17 Otto 147, 152; and it is unnecessary to do so here. Full significance is given to the title of the Robinson-Patman Act, to its division into four sections and to its use of quotation marks if it is construed as follows:

> 1. The enacting clause, as required by R. S. § 7, consists of only the italicized words ending with "* * * *in Congress assembled*", and applies to all four sections of the Act as required by R. S. § 9;
>
> 2. Section 1 of the Act, although necessarily including the enacting clause, by reason of R. S. § 9, actually begins with the words "That section 2 of the [Clayton Act] * * * is amended to read as follows";
>
> 3. The portion of Section 1 in quotation marks—subsections (a) through (f)—comprises all of the text of the amended Section 2 of the Clayton Act; and
>
> 4. Sections 2, 3 and 4 of the Act are to be read as if each were preceded by the enacting clause prescribed by R. S. § 7 and are, therefore, new enactments not part of the Clayton Act.

Acts like the Robinson-Patman Act containing provisions that rewrite the text of existing statutes along with new enactments are not unusual. The same Congress that enacted the Robinson-Patman Act used this form of statute in:

> 49 Stat. 1249, relating to Marine officers;
>
> 49 Stat. 1555, relating to the Migratory Bird Act;

9. The text of § 9 is stated, *supra*, in "Statutes Involved". It is now found in 1 U. S. C. § 103. Emphasis is added to the non-use of quotation marks in Sections 2, 3 and 4 by R. S. § 10 (4 U. S. C. (1934 ed.) § 24), which provided that each section of an Act should be numbered and should contain, as nearly as may be, a single proposition of enactment. The custom of Congress is, however, not to number the first section of an Act.

49 Stat. 1925, relating to the Naturalization Laws; and

49 Stat. 1930, relating to the Welfare of American Seamen.

The Taft-Hartley Act (61 Stat. 136) is also in this form, Title I rewriting existing law and Titles II through V being new enactments. The brief of the petitioner in *Safeway, Inc.* v. *Vance* (No. 69 at the Oct. 1957 term of this Court) cites additional examples (fn. 1, p. 20).

It is significant that Petitioner's argument does not adopt, or even cite, the decision in the *Vance* case. It seemingly repudiates it. Petitioner states at pp. 8, 9 of its brief:

> "The Robinson-Patman Act (49 Stat. 1526) consists of Sec. 1 (consisting of Paragraphs A, B, C, D, E and F) purporting to amend Sec. 2 of the Clayton Act; and Sections 2, 3 and 4."

And at pp. 14-15, Petitioner says of the report (80 Cong. Rec. 9414) of the House members of the House and Senate Conference Committee that drafted the Robinson-Patman Act:

> "It is plain that the report * * * merely calls attention to the fact that Sec. 1 of the bill is the part that amends Sec. 2; and that it was accomplished by dividing Sec. 2 into a number of paragraphs. The report does no more than thus emphasize that Sections 2, 3 and 4 are not substitutes or replacements for what had been *in Sec. 2 of* the Clayton Act; but that Sec. 2 of the Clayton Act was being replaced by what was to be found in Sec. 1 of the bill." [Italics are Petitioner's.]

Petitioner argues that Section 3 of the Robinson-Patman Act deals with the same subject matter as Section 2 of the Clayton Act, discriminatory prices and allowances, and should, therefore, be treated as an amendment of the Clayton Act generally.

Does Petitioner suggest that Sections 2, 3 and 4 of the Robinson-Patman Act were intended to be added to the Clayton Act? When Congress adds sections to an existing Act, it does so in no uncertain terms and states expressly that it is doing so. When, in 1955, additional Sections 4A and 4B were added to the Clayton Act, Congress said that the Clayton Act "is amended by inserting at the end of Section 4 the following new sections" (69 Stat. 282). This identical procedure was followed by the same Congress that enacted the Robinson-Patman Act when it added new sections to existing acts in 49 Stat. 539, 540; 49 Stat. 613, 614 and 49 Stat. 1491, 1492-1497.[10]

More important, however, is the fact that only the first two of the three clauses of Section 3, each of which states a separate offense, deal with discriminatory prices and allowances. The third clause of Section 3, which is that involved here, deals with selling at unreasonably low prices[11] for the purpose of destroying competition or eliminating a competitor, a subject matter more closely related to monopolizing and attempts to monopolize, condemned by Section 2 of the Sherman Act, than to anything found in the Clayton Act.

If Petitioner's argument had validity, the first two clauses of Section 3 would be part of the Clayton Act, the last part would be part of the Sherman Act, and other anti-trust laws such as the Federal Trade Commission Act, the Packers and Stockyards Act, the Tariff Act of 1930, etc.,

10. That Section 2 of the Robinson-Patman Act refers to "this amendatory Act" adds nothing to Petitioner's argument. Obviously, an Act is "amendatory" if *only* one section thereof amends another.

11. The constitutionality of this part of Section 3 has been questioned by some legal writers on the ground that it provides no ascertainable standard of guilt under *U. S. v. Cohen Grocery Co.*, 255 U. S. 81 and *Cline v. Frink Dairy Co.*, 274 U. S. 445. The issue not presented here.

would also be parts of the Clayton, Sherman, and Wilson Tariff Acts.

In support of its contention that the entire Robinson-Patman Act amends the Clayton Act generally (Br. 15-19) Petitioner cites a number of cases from which it quotes language to the general effect that a law is amended when it is permitted to remain and something is added or taken from it, or it is in some way altered to better accomplish its purpose, and that any change of the scope or effect of an existing statute is treated as amendatory. But these cases do not support Petitioner's position. Section 3 of the Robinson-Patman Act stands on its own feet. It contains its own rules of conduct and prescribes its own remedy—criminal penalties—for a violation of its rules. If Section 3 were to be repealed tomorrow it would not affect the Clayton Act by one whit. Section 3 adds nothing to the Clayton Act, takes nothing from it, does not alter it, and in no way changes its scope or effect.[12] This is not the kind of situation dealt with in the decisions cited by Petitioner. Those decisions contribute nothing to the ascertainment of the intent of Congress with respect to the Robinson-Patman Act.

Even if there were no presumption against Petitioner's contention, the text of the Robinson-Patman Act, viewed in the light of applicable statutes and Congressional customs and usages of draftsmanship, shows first, that Section 3 is not part of the amendment of Section 2 of the Clayton

12. This was understood by Congress. Representative Utterback, Chairman of the House members of the Conference Committee that drafted the present form of the Robinson-Patman Act told the House (80 Cong. Rec. 9419):

> "Section 3 of the bill sets aside certain practices therein described and attaches to their commission the criminal penalties of fine and imprisonment therein provided. *It does not effect the scope or operation of the* prohibitions or limitations laid down by the *Clayton Act* amendment provided for in Section 1. *It authorizes nothing therein prohibited. It detracts nothing from them.*" (Italics supplied.)

Act found in Section 1, which Petitioner does not dispute, and second, that it is a separate enactment, stating its own rules of conduct and providing its own penalties, and is not part of the Clayton Act. That Congress intended this result is shown by its failure to enact S. 3516, 84th Congress, second session, which would have made Section 3 one of the "antitrust laws" designated in Section 1 of the Clayton Act.

Reference to the legislative history supplies added evidence that Congress intended Section 3 not to be part of the Clayton Act.

B. The Legislative History of the Robinson-Patman Act Also Shows That Section 3 Is Not Part of the Clayton Act.

The language now found in Section 3 of the Robinson-Patman Act had its origin in the Borah-Van Nuys bill (S. 4171), which died in the Senate. (This language is referred to hereafter as the "Borah-Van Nuys language.")

While H. R. 8442, which became the Robinson-Patman Act, was pending in the House, an amendment was offered to strike all provisions following the enacting clause and to substitute the Borah-Van Nuys language but the amendment was defeated (80 Cong. Rec. 8226-8227, 8229). When H. R. 8442 was passed by the House, therefore, it intentionally did not contain the Borah-Van Nuys language.

When H. R. 8442 reached the Senate, everything following the enacting clause was stricken and a new text was substituted (80 Cong. Rec. 8418-8419). (This text is printed in full at 80 Cong. Rec. 8418-8419.) The new text was all in one section and rewrote Section 2 of the Clayton Act into eight subsections numbered "(a)" through "(h)".

Subsection "(h)" contained the Borah-Van Nuys language.[13]

If the Robinson-Patman Act had been enacted with this text, the Borah-VanNuys language would have become part of amended Section 2 of the Clayton Act and the provisions of Section 4 and 16 of the Clayton Act authorizing private actions would have been applicable to it.

But H. R. 8442 then went to a Conference Committee which compromised the conflicting views of the Senate and House by drafting what is now the Robinson-Patman Act. The Committee removed the Borah-Van Nuys language from Section 1, where it was part of the amendment of the Clayton Act, and gave it its own section number—Section 3. This deliberate action establishes, in and of itself, that Congress affirmatively intended Section 3 not to become part of the Clayton Act.

The report of the House members of the Conference Committee shows that Section 3 was not part of the Clayton Act. (The report is found at 80 Cong. Rec. 9414-9415.) The report said:

"SECTION 1.

"The first section both of the House Bill and Senate amendment amend section 2 of the Clayton Act and

13. The text which the Senate substituted for that of the House was that of the Robinson bill (S. 3154) as passed by the Senate. (80 Cong. Rec. 8418) and which died in the House. Although, as noted by Petitioner (Br. 31), the Congressional Record shows Senator Borah offered the Borah-Van Nuys language as a separate "section" (80 Cong. Rec. 6349) of S. 3154, the Senator must have actually made the offer as a separate "subsection" because S. 3154 as passed by the Senate unquestionably contained the Borah-Van Nuys language not as a "section" but as a "subsection" of the bill (80 Cong. Rec. 8418, 8419, and see the printed S. 3154 as it passed the Senate). However, this question is of only academic interest because H. R. 8442 as passed by the Senate and sent to the Conference Committee plainly contained the Borah-Van Nuys language as part of Section 1 and hence as part of the amendment of the Clayton Act.

divide said section 2 into a number of subsections. The subsections hereinafter mentioned, therefore, refer to the subsections into which it is proposed to divide section 2 of the Clayton Act.

"Subsection (A).

* * * * *

"Subsection (F).

* * * * *

"SECTION 2.

"* * * Relating only to pending rights of action and proceedings, and being therefore temporary in purpose, it [Sec. 2] appears in the conference report as *Section 2 of the bill itself*, rather than as part of *the amendment to Section 2 of the Clayton Act, which is provided for in Section 1 of the present bill.*

"SECTION 3.

"Subsection (h) of the Senate amendment, which was not contained in the House Bill, * * * appears in the conference report as *section 3 of the bill itself*. It contains the operative and penal provisions of what was originally the Borah-Van Nuys bill (S. 4171). While they overlap in some respects, they are in no way inconsistent with the *provisions of the Clayton Act amendment provided for in section 1* * * *." (Italics supplied.)

Representative Miller, one of the House Conferees, was asked during the debate on the Conference bill whether section 3 was "a part of the same act" as that part of the bill amending the Clayton Act. (80 Cong. Rec. 9241.) He replied:

"Of course it is, but it is not a part of the Clayton Act as amended by Section 2. [*i. e.* Section 1 of the Robinson-Patman Act.]"

Petitioner has assembled extracts from the debates on the Conference bill (Br. 12, 13, 33-38) which it construes as

showing that Congress intended that a private action for treble damages could be maintained under Section 3. But they are not subject to this construction, whether read separately or together. They go no further than to point out that Congress appreciated the fact that when a single act violated the overlapping provisions of Section 2 of the Clayton Act (Section 1 of the bill) and Section 3 of the Robinson-Patman Act, an injured person could recover treble damages for the violation of Section 2 of the Clayton Act but not for the violation of Section 3 of the Robinson-Patman Act. This is illustrated by the following exchange between Congressmen Celler and Miller at the end of the debate (80 Cong. Rec. 9241 and Pet. Br. p. 38; both were members of the Conference Committee):

> "Mr. Celler: It is possible, of course, for a man to violate section 3 and by that same act be guilty of violation of the other sections of the bill?
>
> Mr. Miller: That would be entirely possible.
>
> Mr. Celler: So that he would be subject to triple damages as well as criminal prosecution?
>
> Mr. Miller: That would be entirely possible."

Mr. Celler, whose remarks earlier in the debate are heavily relied upon by Petitioner (Br. 36-38), thus made it clear that no private right of action exists under Section 3 as such, although an act violating both Section 2 of the Clayton Act (as amended by Section 1 of the Robinson-Patman Act) and Section 3 gives rise to a private action for the Section 2 violation.[14]

The debates on the Conference bill are further analyzed in the brief (pp. 25-30) of the petitioner in the *Safeway*

14. Representative Patman, co-author of the Act, testified May 10, 1950 (Hearing on H. R. 7905, Serial No. 14, Part 5, p. 48, 81st Cong. 2nd Sess.—H. R. 7905 was a bill to amend the Clayton Act) that "Section 3 of the Robinson-Patman Act has never been added to the list of laws designated as 'antitrust laws' in Section 1 of the Clayton Act." *Cf. Labor Board* v. *Dant*, 344 U. S. 375, fn. 13, p. 385.

case (No. 69 at the Oct. 1957 term of this Court). That discussion is not repeated here.

Even, therefore, if there were no presumption against Section 3 becoming part of the Clayton Act by implication, in the words of the Court below (R. 17):

> "The legislative history is convincing that there was no intention by Congress for section 3 of the Robinson-Patman Act to be an amendment of the Clayton Act."

Thus, the text of the Act, its legislative history and the presumption against Petitioner's position all support the position of Respondent.

C. There Is No Merit to Petitioner's Contention That the House Judiciary Committee Codification of Section 3 of the Robinson-Patman Act Is a Significant Administrative Construction.

Little need be said concerning Petitioner's argument (Br. pp. 19-20) that great weight should be given to the House Judiciary Committee's perpetuation of its error in codifying Section 3 of the Robinson-Patman Act as an "antitrust law" within the designation of Section 1 of the Clayton Act. Not only was the action and nonaction of the House Judiciary Committee not an administrative interpretation, but Petitioner's contention is directly contrary to 61 Stat. 633, 1 U. S. C. § 204 (a)[15] and *Stephan* v. *United States*, 319 U. S. 423, 426, to the effect that provisions of the United States Code may not prevail over the Statutes at Large when the two are inconsistent.

15. Quoted *supra* in "Statutes Involved". It provides the Code shall be only "prima facie evidence" of the law unless the Code has been enacted into positive law. None of Title 15 of the Code, which contains the Clayton and Robinson-Patman Acts, has been enacted into positive law.

III.

THE DECISION OF THE COURT BELOW STATES THE SOUNDER VIEW OF THE DECIDED AUTHORITIES.

The leading authority other than *Vance* holding that a private action may be maintained by reason of a violation of Section 3 of the Robinson-Patman Act is the decision of Judge Yankwich in *Balian Ice Cream Co.* v. *Arden Farms Co.*, 94 F. Supp. 796.[16] The Court of Appeals for the Tenth Circuit expressly adopted its "reasoning and conclusions" in its opinion in *Vance* v. *Safeway Stores, Inc.*, 239 F. 2d 144, 146.

The reasoning and conclusions of the *Balian* decision are unsatisfactory in several respects:

1. Its premise (p. 798 of 94 F. Supp.) that when the codifiers consolidated the Robinson-Patman Act into the U. S. Code "they reworded the Section [Sec. 1, Clayton Act] so as to cover *all* the antitrust laws then in existence" [Italics not added] is not well founded as shown heretofore in this brief;

2. Its premise that there was (pp. 801-802 of 94 F. Supp.) a "continuity of the policy evidenced by the history of antitrust legislation to use the triple damage action as an adjunct of governmental enforcement" is not well founded because the Federal Trade Commission Act and the other antitrust laws referred to in point I of this brief do not provide for treble damage actions;

3. Its conclusion (p. 800 of 94 F. Supp.) that "The legislative history of the Robinson-Patman Act is revealing although not entirely conclusive, on the point under discussion" is unaccompanied by any recognition of the refusal of the House to substitute the Borah-Van Nuys language for that of the Patman bill (H. R. 8442) or of the action of the Conference Committee

16. The case was tried and appealed but Section 3 was not in issue on the appeal. *Balian Ice Cream Co.* v. *Arden Farms Co.*, 231 F. 2d 356, 388 (C. A. 9).

in shifting the Borah-Van Nuys language from subsection (h) of Section 1, where the Senate had placed it, to a separate section not part of the Clayton Act amendment. This implies that the Court may not have been fully informed as to the legislative history; and

4. None of the authorities upon which the decision relies involved the specific issue presented here, as is pointed out in the brief of the petitioner (pp. 32-35) in *Safeway Stores, Inc.* v. *Vance* (No. 69 at the Oct. 1957 term of this Court).

Petitioner relies on dicta of this Court in *Bruce's Juices* v. *American Can Co.*, 330 U. S. 743, 750 and *Moore* v. *Mead's Fine Bread*, 348 U. S. 115, 117-118. In neither of these cases, however, was the private right to sue under Section 3 in issue. In each, the decision is well founded on amended Section 2 of the Clayton Act.

Petitioner also advances an argument that these dicta are a "construction" of Section 3 by this Court which has received Congressional approval through Congressional inaction. Decisions, not dicta, are required to invoke this rule.

Other authorities are analyzed in the petitioner's brief in the *Safeway* case (p. 31 *et seq.*). As shown there and in this brief, the decision of the Court below states the sounder view.

Congress has not left the courts at large to devise every feasible means for protecting the public against acts tending to restrain trade. The judicial function ends with the endeavor to ascertain from the words used, construed in the light of the relevant material, what was in fact the intent of Congress. *United States* v. *Cooper Corp.*, 312 U. S. 600, 606.

CONCLUSION.

For the reasons stated, Respondent submits that Section 3 of the Robinson-Patman Act is not one of the "anti-trust laws" designated by Section 1 of the Clayton Act, and that the judgment of the Court of Appeals for the Seventh Circuit should be affirmed.

Petitioner asks that the judgment be reversed. In no event should the court do more than remand the case to the Court of Appeals for a determination of the other issues presented there but not reached by that Court.

Respectfully submitted,

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